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Hines v Eastland Port Limited (Auckland) [2018] NZERA 7; [2018] NZERA Auckland 7 (10 January 2018)

Last Updated: 19 January 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 7
3012991

BETWEEN PAUL HINES Applicant

A N D EASTLAND PORT LIMITED Respondent

Member of Authority: T G Tetitaha

Representatives: P McBride, Counsel for the Applicant

L Brown, Counsel for the Respondent

Investigation Meeting: 5 to 6 July, 29 to 30 August and 3 to 4 October 2017 in

Gisborne

Submissions received: 4 October 2017 from both parties

Date of Determination: 10 January 2018

DETERMINATION OF THE AUTHORITY

a. Captain Hines was justifiably dismissed by Eastland Ports Limited.

There is no need to consider the remedy of reinstatement as a consequence.

b. The application is dismissed. Costs reserved.

[1] Paul Hines alleges he was unjustifiably dismissed and/or disadvantaged by the actions of his former employer Eastland Port Limited.

Relevant Facts

[2] Eastland Port Limited (EPL) operates the Gisborne Port area including the provision of pilotage to ships within the Gisborne Port pilotage area. Pilotage is governed by the [Maritime Transport Act 1994](#) and Maritime Rules Part 90 (Rules).

[3] Paul Hines was employed as a marine manager/pilot on 18 May 2015. He signed an individual employment agreement (IEA)¹ attaching a job description. His job description set out his principal accountabilities which included:

- To carry out pilotage duties on behalf of EPL
- To ensure compliance by [EPL] of all regulations and legislative requirements on an ongoing basis. This includes maritime health and safety, OSH, environmental, customs, and various statutory legislation etc.

[4] The definition of pilotage is prescribed by the Rules. Pilotage is the conduct by a pilot of a ship within a prescribed pilotage area that may include weight limitations.² For Gisborne port pilotage was required for ships weighing greater than

500 gross tonnage and operating within a prescribed area³ (pilotage area).

[5] He was also rostered to work with another pilot, Captain Chris Kaye, but Captain Hines worked largely unsupervised. His job description placed some limitations upon his authority to act:

AUTHORITY AND FREEDOM OF ACTION

The position of Marine Manager/Pilot requires that any issue of an unusual nature is brought to the attention of the General Manager Ports. In defining “unusual” this requires the incumbent to assess any particular issue or circumstance through the experience brought to the position. Where such issue or circumstance is outside their experience this should be advised.

[6] This restriction is relevant to Captain Hines later actions leading to his dismissal.

Misconduct

[7] When Captain Hines was rostered to provide pilotage it is accepted he did not pilot the Emerald Princess as it left the Gisborne pilotage area on 26 February 2017. The Emerald Princess is a cruise ship weighing more than 500 gross tons.

[8] On 30 March 2017 Captain Hines was again rostered to provide pilotage. It is accepted he was not on board the Seamount Explorer, a fishing vessel weighing more than 500 gross tonnes when it entered the Gisborne pilotage area. During the vessel's

berthing the bow of the Seamount Explorer collided with the Moana Pacific Ice

¹ Individual Employment Agreement EPL and Paul Hines dated 8 December 2016.

² Maritime Rules Part 90: Rule 90.3 Definitions and abbreviations.

³ Maritime Rules Part 90: Appendix 1.

Tower causing damage to an ice conveyer and creating risk for people located in and around the area.

Investigation

[9] Andrew Gaddum, General Manager Ports became aware of the incident involving the Seamount Explorer from Captain Christopher Kaye on 31 March 2017. Captain Kaye was piloting the Seamount Explorer as it left the Gisborne pilotage area. He was advised by the Master that he had not been required to carry a pilot when he entered.

[10] Mr Gaddum emailed Captain Hines that same day asking why the Seamount Explorer weighing 671 tonnes had berthed without a pilot as required by the Rules. Captain Hines reply was “this vessel was berthed under the supervision of a pilot” and this was “authorised by the Gisborne Harbourmaster”.

[11] Mr Gaddum then advised on 3 April he had logged the incident within the Risk Manager and asked John Gordon, EPL Health and Safety and Environmental Facilitator to investigate.

Suspension

[12] During the course of the investigation, it was brought to Mr Gaddum's attention that the cruise ship, Emerald Princess had also left the Gisborne Port without pilotage when Captain Hines was rostered to work.

[13] On 5 April 2017 Mr Gaddum advised of the additional concern, Captain Hine's admission Rule 90 had been breached and the fact this was now both a health and safety and disciplinary investigation. Given the serious nature of the allegations and Captain Hine's admissions, he made the decision to place Captain Hines under the supervision of Captain Kaye. No opportunity was given to Captain Hines to discuss this with Mr Gaddum before the suspension occurred.

Disciplinary process

[14] Mr Gaddum wrote to Captain Hines on 9 May 2017. He provided a copy of the investigation report, Captain Hines job description and the Health and Safety Policies and Procedures. He then sought a meeting with Captain Hines to discuss his concerns there was serious misconduct.

[15] The parties met. Following that meeting, Mr Gaddum advised on 18 May

2017 that he was satisfied Captain Hine's behaviour amounted to serious misconduct. A further meeting was sought. Captain Hines was also relieved from piloting duties up until the time of the meeting. No opportunity to discuss the relief from duties was given prior to its imposition.

Dismissal

[16] The parties met and Captain Hines provided a written reply.

[17] On 31 May 2017 Mr Gaddum advised he remained satisfied there was serious misconduct. However he no longer had trust and confidence in Captain Hines. As a consequence his employment was terminated. He was paid 1 month's pay as a gesture of good faith and his outstanding annual leave.

Issues

[18] The issues for hearing were agreed at an earlier telephone conference as follows:

(a) Whether Captain Hines was unjustifiably dismissed;

(b) Whether Captain Hines was unjustifiably disadvantaged by the following actions:

(i) Suspension;

(ii) Demotion; and

(iii) Discrimination by the respondent's response to the personal grievance having been taken and his dismissal occurring within a 12 month period; and

(c) What remedies, if any, should arise including in particular the remedy of reinstatement.

[19] I have elected to deal with the unjustified dismissal only within this determination. This is because of the delays in managing this matter to determination. This matter was originally given an early substantive hearing in July 2017 but was unable to be completed within the estimated timeframe. A hearing in August was

shortened to 1 day due to a misunderstanding about the start date. The matter required a further two days to complete the oral evidence. The applicant requested time to file evidence about mitigation. The respondent filed further information that required a reply. The last piece of evidence was only filed on 5 December 2017.

[20] With the intervening holiday period and the pressure of other work before me, it seems more expedient to prioritise the unjustified dismissal grievance because of the reinstatement remedy sought. The remaining grievances shall be dealt with at a later date within the statutory timeframe provided.

Was Captain Hines was unjustifiably dismissed?

[21] The allegations of serious misconduct pertain to the failure to provide pilotage for the Emerald Princess and the Seamount Explorer. This requires an analysis of the Rules pertaining to pilotage in the Gisborne Port.

Was Captain Hines required to physically be present upon both vessels?

[22] The Rules defined pilotage as:

pilotage means the conduct of a ship by a pilot and **to pilot a ship** has a corresponding meaning

[23] Rule 90.23(2) provides context for the meaning of "pilotage". This Rule requires a ship "carry a pilot" i.e. that the pilot is physically present on the ship:

90.23 Requirement to carry a pilot

(1) Except as provided in subrules (3), (4) and (6), the master of an oil tanker, chemical tanker, or gas carrier must ensure that the ship, when navigating in any pilotage area either—

(a) carries a pilot who holds a current, appropriate pilot licence; or

(b) receives advice⁶ from a pilot ashore or aboard another vessel, who holds a current appropriate pilot licence, in circumstances where the master has been informed by the pilot that⁷—

(i) the pilot is unable to transfer to or from the ship safely; and

(ii) in the opinion of the pilot, the movement of the ship within the pilotage area can be completed safely, with the pilot's advice.

(2) Except as provided in subrule (6) and rule 90.24, the master of any ship, other than an oil tanker, chemical tanker or gas carrier, that meets or exceeds any limits specified for a pilotage area must ensure that the ship, when navigating in that pilotage area, either—

(a) carries a pilot who holds a current, appropriate pilot licence; or

(b) receives advice from a pilot ashore or aboard another vessel, who holds a current appropriate pilot licence, in circumstances where the master has been informed by the pilot that⁸—

(i) the pilot is unable to transfer to or from the ship safely; and

(ii) in the opinion of the pilot, the movement of the ship within the pilotage area can be completed safely, with the pilot's advice.

...

(6) Subrules (1) and (2) do not apply where the ship is transiting between the perimeter of the pilotage area and a designated pilot boarding station or anchorage within that pilotage area⁹ with the prior approval of a pilot¹⁰.

Footnotes

6 Advice in such circumstances may be given via radio communication or shore signal.

7 This situation should be covered by the pilotage provider's Standard Operating Procedures (SOPs), which must specify the circumstances in which 'leading in' or 'leading out' of ships by a pilot is permitted, and when the harbourmaster should be consulted before proceeding. In some pilotage areas, leading in may be considered unsafe in any circumstances and will not be permitted.

8 See Note 7 above.

9 A designated pilot boarding station or anchorage at a location specified in the pilotage provider's or port operator's SOPs and identified on nautical charts.

10 Such approvals must only be given in accordance with the pilotage provider's SOPs and may not be appropriate in all pilotage areas or circumstances. Where adopted, such arrangements must be agreed between the pilotage provider and the harbourmaster. Approvals may be relayed to a ship by an appropriately qualified person, other than a pilot, who is designated to do so in the accordance with those SOPs.

[24] Ships whose Masters hold a Pilot Exemption Certificate (PEC) for Gisborne Port are not required to carry a pilot.⁴ However ships over 500 gross tonnage are required to carry a pilot unless a pilot is unable to transfer to or from the ship safely and the movement of the ship can be completed safely with the pilot's advice.

Emerald Princess

[25] The Emerald Princess was carrying a pilot, namely Captain Hines when it entered Gisborne Port pilotage area. It was anchored within the pilotage area during its stay.

[26] Captain Hines alleges he came to an agreement with the ship's Captain during its entry into Gisborne Port to dispense with pilotage when the Emerald Princess was due to leave. The evidence of this agreement was inconsistent and I was not satisfied of its existence on the balance of probabilities.

[27] More importantly, the Rules only allow pilots and Masters to agree to dispense with carrying a pilot in certain circumstances. From the evidence none of those exceptions applied here.

[28] Even if there was any agreement, Captain Hines should have been aware of the requirements under the Rules to carry a pilot. His actions induced the Captain of ship to possibly make an agreement to his detriment rendering him liable to civil or criminal prosecution in the event of any incident.

[29] It does not matter that there was no incident as a result of Captain Hine's actions. The objective of the Rules "*is to maintain the contribution of pilotage to the safety of navigation, the protection of the marine environment and the efficiency of seaborne commerce*". Piecemeal arrangements to dispense pilotage outside of the Rules override safety, protection and place seaborne commerce at risk.

[30] Captain Hine's alleged a Harbourmasters Direction allowed the ship to leave without pilotage. He produced Harbourmasters Direction 03-15 Pilotage dated

21 July 2015 (HM Direction).

[31] Maritime Rule 90.23(6) states that the usual rules requiring a ship carry a pilot do not apply, "*where the ship is transiting between the perimeter of the pilotage area and a designated pilot boarding station or anchorage within that pilotage area with the prior approval of a pilot*". Footnote 10 states that those approvals must only be

given in accordance with the pilotage providers SOPs.⁵

[32] The HM Direction is not on its face the pilotage providers (EPL) SOP. I have seen the only example of an EPL SOP and this is not the same. The HM Direction identifies when pilots may disembark during bad weather. It does not condone Captain Hines actions when the Emerald Princess exited Gisborne pilotage area because he was not on board to disembark.

[33] Captain Hine's actions and enquiries could not have reasonably satisfied him the crew was able to safely leave the pilotage area. His evidence was of a visual assessment of the crew during his pilotage of the ship into the pilotage area. He made no other enquiries. At hearing he admitted he had no knowledge of whether the same crew would be sailing the ship out of the Port. From the evidence it was clear a first officer not the Captain sailed the ship out of the Port.

[34] Captain Hines alleged he made arrangements for the Emerald Princess' Captain to contact him when they left the Port. However it was clear from the ships emails that they were unaware of any agreement and were trying to contact him to provide pilotage but were unable to do so. There was no explanation why Captain

Hines did not contact the Emerald Princess himself before it left to reassure himself of their capability to safely leave without a pilot. He seems to have left it up to the Captain to make these arrangements with the crew.

[35] From the evidence it was clear the Emerald Princess did not know Captain Hines was monitoring the Emerald Princess which I understand was through a program on his cellphone. This seems to have occurred without the ships knowledge. This also inconsistent with the Rules. An eligible ship not carrying a pilot must be under "the pilot's advice". The Rules give examples of this as being by "radio

communication or shore signal."⁶ Both forms of communication infer the ship is

aware a pilot is observing their movement and available to provide advice. Captain Hines alleged he undertook monitoring via his cellphone – an action he told no one about including the Emerald Princess itself. I cannot see how that would assist the ships' crew in the event of any difficulty.

[36] It was clear an agreement to dispense with pilotage was unusual and outside of Captain Hines experience. If that was the case his job description required that he report this to the Ports General Manager, Mr Gaddum.⁷ He did not. It was not until the disciplinary process began that this behaviour was uncovered some months later. This may have breached his employment agreement.⁸

Seamount Explorer

[37] Given my above findings about the Rules, the Seamount Explorer was therefore required to carry a pilot unless one of the above exemptions applied. None of those applied at the time the ship entered Gisborne Port pilotage area.

[38] Captain Hines alleged he provided "remote pilotage" by monitoring the Seamount Explorers entry into Port from Kaiti Beach Road. He also argued he may have mistakenly believed Rule 90.23(2)(b)(i) and (ii) were not cumulative but alternatives because he read the "and" as an "or".⁹ His belief does not make the pilotage he allegedly provided within the Rules. The Rules clearly require a ship

carry a pilot unless there are issues of pilot safety in transferring to the ship. There

⁶ See paragraph [25] Footnote 6 above.

⁷ See paragraph [5] above.

⁸ Clause 2(c) and paragraph [5] above.

were no safety issues here to prevent Captain Hines from boarding the ship. The

Rules do not allow for "remote pilotage" that Captain Hines provided.

[39] Captain Hines also alleges the remote pilotage was discussed and approved by the Harbourmaster, Carl Magazinovic. Mr Magazinovic accepted the ship was discussed but not named and he believed it was less than 500 gross tonnage. Captain Hines is adamant he told the Harbourmaster the name and gross tonnage of the ship (671 GT).

[40] There is no corroborative evidence supporting either witness about the details of the discussion. After hearing from them, I was left in some doubt about the veracity of both witnesses.

[41] There was no statutory or regulatory provision condoning this type of agreement between the Harbourmaster and Captain Hines for pilotage. This was also an unusual event. His job description required Mr Gaddum's permission to act, not the Harbourmasters.

[42] Captain Hines allegedly told Deane Craw, Port Services Manager, the Seamount Explorer required pilotage. This is after he is told the crew's competency and the qualifications of the two skippers and their "various PECs and local knowledge". Despite this, he then initiates a discussion with the Harbourmaster to dispense with pilotage or provide "remote pilotage" on the basis of the same information he obtained from Mr Craw. This demonstrates a "flip flop" approach to pilotage as opposed to a properly reasoned evidential basis.

[43] Captain Hines makes no contact at all with the crew of the Seamount Explorer to check their ability to manoeuvre within the pilotage area without a pilot. He knew this ship had "draft" issues i.e. its gross tonnage made it susceptible to being grounded in the berthing area. He had the required expertise about the most appropriate approach to the ships berth. He also knew all of the obstacles therein including the location of the Moana Ice Tower at the berth. In my view his local knowledge and therefore pilotage was crucial to the safe berthing of this ship.

[44] His lack of contact with the crew was markedly different from the approach he took to the Emerald Princess before dispensing with pilotage. He had even less information and arguably greater risk of an incident. He would not have known who was sailing the vessel when it entered the Port because he had not spoken to the crew

about their arrangements. This reinforces my view Captain Hines was acting in an unsatisfactory way about this ships pilotage.

[45] Captain Hines in his written response to EPL stated "there was no operational reason to contact the vessels master whilst it was transiting the port environs. Any interruption which causes any distraction to the concentration of a person conducting a pilotage manoeuvre is considered as a risk and is strongly not advised." This statement is correct given he never contacted the ships' crew prior to it attempting to berth. The Rules contemplate that the movement of the ship must be completed "with

the pilots' advice."¹⁰ This must assume he has made contact and provided a method

to communicate with the crew during its movement. Otherwise the ship cannot be under the pilots' advice at all – it is on its own. The lack of contact at all with the ship indicates the remote pilotage provided was not "with the pilots advice" at all.

[46] I also undertook a site visit of the area Captain Hines states he undertook the remote pilotage. Captain Hines alleged he could view the ships draft or height above the waterline and concluded it was sufficient to safely berth. Several witnesses disagreed this area was the most appropriate to view ships draft. Captain Kaye believed a pilot should be alongside the wharf as the vessel approached the berth.

[47] From my observations, I agree with Captain Kaye there were better positions to view the Seamount Explorer's draft than where Captain Hines says he was. There were obstructions of his view of the ship. He could not at all times have properly seen whether the Seamount Explorer's draft was sufficient to safely berth. If the ship had become grounded in the Port, all commercial activity would have halted resulting in lost commerce for the EPL and possibly other civil and criminal action. The choice of position to observe the berthing was illogical and unsafe in my view.

[48] It is equally concerning Captain Hines appears to have left before the berthing was completed because he did not observe the collision with the ice tower. This does not equate in any way with the pilotage service that would have been provided if he had been on board the ship. He would have been required to remain on the ship until it had completed its berthing.

[49] Whilst I accept the Master of the ship is primarily liable for the damage caused by the collision, it does not detract from the objectives of pilotage being for "the

safety of navigation" and "protection of the marine environment" in the Rules.¹¹

Pilotage contributes to minimising risks for ships manoeuvring within the Port pilotage area. There was no evidence Captain Hines undertook an adequate risk assessment (if any) of not providing pilotage. When asked about this he stated "risks always there" and "by default it was left to the Captain."

[50] Here the ship colluded the ice conveyer and created actual risk for the people working in and around the Moana Ice Tower. There was evidence of workers jumping fences to avoid being hit by debris. Captain Hines responses about this risk were not reassuring even at hearing. He focused on blaming the Master of the Seamount Explorer and minimising the risk of his decision making. It demonstrated a lack of appreciation of the riskiness of his decision making.

[51] There was other evidence disputing Captain Hines was on Kaiti Road at all. A CCTV camera located on Gladstone Road showed Captain Hines vehicle travelling towards Kaiti Road at a much later time than he states. Captain Hines alleges he travelled to the observation at Kaiti Road on a different route then returned the same way before going to the Gladstone Road Caltex petrol station for fuel. His fuel card did not show the purchase of petrol on 30 March 2017 from the Gladstone Road Caltex station. No other corroborating evidence has been produced of his alleged fuel purchase.

[52] Finally a CCTV camera located across the harbour from Kaiti Beach Road does not show Captain Hines motor vehicle stationary in the alleged location on date and time he alleges.

[53] This was sufficient evidence for EPL to reasonably suspect Captain Hines was being dishonest about his observation of the berthing.

[54] Captain Hines actions also impacted upon EPL's reputation. Both of the two ships crews involved remarked to Harbourmaster and Captain Kaye about EPL's inconsistent approach to pilotage as a result of Captain Hines's actions. It is possible they have made similar remarks to other commercial users of Gisborne Port.

[55] These actions may also make the Master of the Seamount Explorer liable to civil or criminal prosecution. I was not impressed by Captain Hines views that the Masters potential civil and criminal liability lessened the seriousness of his actions.

[56] Taking into account the above, EPL could have reasonably concluded there was serious misconduct that was destructive of implied term of trust and confidence. This includes Captain Hines non-compliance with Maritime Rule 90 by not piloting the Emerald Princess and Seamount Explorer. Those actions also supported the conclusion he failed to exercise good judgment expected of a senior manager and acted in a manner that undermined the company's reputation.

[57] Although a factual finding of dishonesty is not required, there were numerous inconsistencies and vagaries in Captain Hines responses to EPL's concerns that indicated the possibility of dishonesty. This primarily relates to his position on Kaiti Beach Road during the berthing of the Seamount Explorer. His lack of remorse would also factor into the loss of trust and confidence. At hearing he continued to maintain his breaches of the Rules were minor and should not have any ramification upon his employment.

Process leading to dismissal

[58] It is accepted Captain Hines was dismissed. The onus falls upon EPL to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2)). In applying this test, the Authority must consider the matters set out in s.103A(3). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[59] I gave an oral indication the process leading to dismissal was flawed. I have had time to consider the evidence again. I have now reached a different conclusion.

[60] Although there were complaints about the investigation, Captain Hines conceded at hearing he did not ask Mr Gordon to investigate anything further. He thought Mr Gordon's investigation "was thorough". He also conceded he didn't ask Mr Gaddum to investigate anything either. Instead he undertook his own investigations and provided this information to Mr Gaddum prior to dismissal.

Despite attempts to persuade me otherwise, I have concluded there was no defect in the investigation undertaken.

[61] It was alleged the concerns expanded to include dishonesty and this was not raised with Captain Hines prior to dismissal. Captain Hines truthfulness was clearly raised in the letter dated 18 May 2017. At various stages the letter states Captain Hines was untruthful, had lied and made a false statement and misrepresented the

situation.¹² I am satisfied the issue of Captain Hines' dishonesty was clearly raised prior to dismissal.

[62] Mr Gaddum admitted being "livid" when advised about Captain Hines actions. This was because EPL prided itself upon its strict health and safety policies. Decision makers in employment situations are not devoid of emotion. Nor are they expected to act as Judges. They are entitled to act partially as long as they meet the requirements of s103A of the Act. Despite his obvious annoyance at Captain Hines, I am satisfied Mr Gaddum was able to genuinely consider Captain Hines responses.

[63] There was evidence of the non-provision of the Emerald Princess' ships log showing their inability to raise Captain Hines. At hearing it was obvious this defect was minor. Captain Hines stated he gave them his number on a business card and the crew dialled the wrong one. The fact he made no contact with them about providing pilotage out of the Port was not contested. This was the serious misconduct alleged. This defect did not affect that concern nor did it create any unfairness.

[64] The main process defect here is the non-provision of the CCTV camera shots of Kaiti Beach Road that show Captain Hines was not at the position alleged prior to dismissal. Captain Hines had little explanation for why this defect created unfairness. He simply disagreed with the evidence. After reviewing the evidence I have concluded this defect was minor and did not create unfairness.

[65] Captain Hines was justifiably dismissed by Eastland Ports Limited. There is no need to consider the remedy of

reinstatement as a consequence. The application is dismissed. Costs reserved.

[66] I had indicated to the parties I would issue an early decision dealing with the dismissal and remedy of reinstatement only. I intend dealing with the remaining

12 Letter dated 18 May 2017 A Gaddum to P Hines at p40 BOD.

disadvantages and breaches of good faith causes of action in a separate decision to be issued later in the year.

T G Tetitaha

Member of the Employment Relations Authority

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